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HOUSE OF REPRESENTATIVES, May 28, 1864.—Ordered to be printed.

[By Mr. GARLAND, from the Judiciary Committee.]

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# MINORITY REPORT

OF THE

# COMMITTEE ON THE JUDICIARY,

*On the suspension of the Habeas Corpus, by act of February 15th, 1864, of the First Congress of the Confederate States, entitled "An Act to suspend the privilege of the writ of habeas corpus in certain cases."*

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When the question of repealing the above entitled act was presented to the House of Representatives at an early day of this session, we were not disposed, nor are we now, to open this vexed and delicate subject, if it could have been consistently avoided. Yielding, in a great degree, our convictions as to this act, we agreed, with the rest of the committee, to report back the bill seeking to repeal such act, with the recommendation that it lie upon the table. We were opposed, upon constitutional convictions, as well as for reasons touching the expediency of the measure, to the passage of this act. But for the sake of harmony and unity of action, and in order not to disturb the public mind upon this subject, we were willing for the act to live out its days and pass silently away. And we certainly hoped this would be the course which the House would adopt. The question has, however, been presented to the House in different forms, and has, by the House, been referred to the committee, on the message of the President in response to a resolution of enquiry adopted by the House. We still believed the whole matter would be permitted to pass without any discussion of the question, or any direct action of the House, and our desire was that the subject should be so disposed of. But the majority of the committee deeming it their duty to present a written report vindicating the act of the 15th of February, 1864, in a paper opening up the whole field of discussion and argu-

ment, we feel it to be a duty from the performance of which, a proper regard to the discharge of the offices incumbent upon us here, will not grant us a dispensation, to make known to the House in a like formal manner, our views upon this vital question. Differing, as we do, from most of the reasoning in the report of the majority, and totally in the conclusion arrived at; and in fact, agreeing in little else than the definition of what is called the writ of *habeas corpus*, we beg leave here to enter our earnest, solemn, and respectful protest to that document being received and adopted by the House as containing true and correct principles under and according to the Constitution, which it is our duty to protect, as well as the usages and practices that have grown up under, and have been recognized as having equal force and effect, with the Constitution itself.

In discussing the questions arising here, we do not deem it necessary to go back into history—in the dim ante-chambers of the past, to search for evidences of the origin of this great writ, and to trace its history minutely to the present day. Nor do we think it worth while to chant peans of praise to this bulwark of freemen's rights. It is of no small consequence for us to know, that long, long before the celebrated statute of 31st, Charles II., this writ was known as the remedy for deliverance from illegal imprisonment—it was, in fact, a common law writ, and the statute of Charles II. only confirmed and extended it. [*Third Bl. Com.* 129, *id* 135; *Crabb's history*, 525.] This statute of Charles II. enacted no new principle; it put forth no new doctrine. For as Hallam, in his constitutional history, says: "It cannot be too frequently repeated, that no power of arbitrary detention has ever been known to our Constitution since the charter obtained at Runneymede—the writ of *habeas corpus* has always been a matter of right." Coming, then, as it does, down from the early history of the mother country to our ancestors, we see they, with a high regard and appreciation for its worth, inserted in the organic law of the old Government just such a provision as we have in our Constitution, touching the suspension of this writ. It is not to be forgotten that our fathers framed the Constitution of the United States amid trying and wonderful scenes. They had met tyranny and had fought it in all its forms and shapes, and just after the end of a "beastly and mad-brained war," they gave to the country this constitutional security and protection. So characteristic was the jealousy of our people in an early day over the legislative action to suspend the *habeas corpus*, though allowed by the Constitution, that, after a bill to do it, in 1807, seems to have passed the Senate of the United States, through all its readings in *one day*, and with closed doors, the House of Representatives rejected it, on the first reading, by a vote of one hundred and thirteen to nineteen. [See journals of the House, 25th and 27th January, 1807,] This was done, although the bill to suspend the *habeas corpus* provided it should be done only when one is charged *on oath* with treason or misdemeanor affecting the peace of the United States, and imprisoned by warrant on authority of the President of the United States, or the Governor of a State or Territory. It was not deemed prudent to suspend it, though

in that mild form, considering such a measure at best, but a species of dictatorship, and to be justified only by extreme peril to the public safety. So universal and so marked was this feeling at and during these periods of the early history of the United States, Mr. Jefferson, certainly one of the most prominent men in all the leading acts and measures of that day, and the founder of a great party, whose followers deemed its tenets synonymous with the welfare and happiness of that Government, has left on record his opinion that it was much wiser, even in insurrections, never to suspend the writ of *habeas corpus*. So strong and pointed is his language, we will be pardoned for quoting it here. Writing to Mr. Madison from Paris, December 20, 1787, touching the plan for Government about to be submitted to the States, Mr. J. says: "I will now tell you what I do not like: first, the omission of a bill of rights, providing clearly, and without the aid of sophism, for freedom of religion, freedom of the press, protection against standing armies, restriction of monopolies, *the eternal and unremitting force of the habeas corpus laws*," &c., &c. [Second volume Memoirs by Thos. J. Randolph, p. 247.] Again from Paris, February 7, 1788, to Mr. Donald he writes, after expressing the hope that the four latest State Conventions before acceding to the Constitution would have a bill of rights, he says: "By a declaration of rights, I mean one which shall stipulate freedom of religion, freedom of the press, freedom of commerce against monopolies, trials by juries in all cases, *no suspension of the habeas corpus*, no standing armies." These are fetters, he says, against doing evil which no honest Government should decline. [same book, p. 291.] The men of that day, (and there were giants then,) had almost this same feeling in common with Mr. Jefferson, and it is useless for us to present evidences of this to this House. Coming on regularly in the course of time, our predecessors, or the fathers of this Government still preserving and keeping alive this sacred love for this writ, inserted in our Constitution the restriction we have in article one, section nine, clause three. This was done at a time when the framers of this instrument had just left a malignant and tyrannical power, which threatened to destroy this as well as all the other valuable safeguards of the old Constitution. They were engaged in building a substantial and permanent house of refuge for our people, in view of the early coming of a storm, not charged with mere sound, but bringing with it desolation and woe in every terrible shape. It will not do to say, they knew not their duties, nor that they were not alive to the responsibilities of the hour. For they claimed, and we do for them, that in planting themselves at Montgomery, they rescued the Constitution from utter destruction, and preserved in ours all that was valuable in the old one. The people of the Confederate States are no less watchful of their rights in this behalf, than were they of the United States in her best and purest days. The Legislatures of two proud and gallant sister States of this noble band of States, (Mississippi and Georgia,) have spoken out boldly and in language that cannot be mistaken in condemnation of this act of February 15, 1864. Certainly their voices are not to be passed unnoticed, nor are their

expressions to be unheeded. They express a regard for the very rights for the security of which this war was inaugurated, felt by the whole pulation of the Confederacy. We share this feeling with them, and when they or we cease to entertain it, they as well as ourselves, are no longer fit to enjoy those liberties for which the people are now making such unheard of sacrifices. And we are proud to know, that in this respect, we are sustained by one whose opinions, not merely on acccount of his position, but from his acknowledged patriotism, judgment and ability, are entitled to the greatest weight; and so apt is his language, we quote it in part justification of the zeal we may display in this investigation. The President, in his message of the 20th May, 1864, submitted to us on this subject, says: "The sensitiveness exhibited in different parts of the country to the legislation on this subject, is indicative of the love of freedom, which is innate among the people, and which should ever be cherished as the sole guarantee for the preservation of their constitutional liberties."

Then, it will not be wondered at, if the people, and some or all of their representatives, should scrutinize closely the action of Congress, in suspending the privilege of this writ, to see whether or not they have been dealt fairly with, in thus being deprived of rights so long and so well guarantied to them. Without any further allusion to the benefits or the sacredness of this writ, it is sufficient for us to know, acting in our representative capacity, that the Constitution under which we hold our offices, and under and by which we *should* act, has preserved this writ intact unless in rare and very urgent and extreme cases. If there were nothing else lying back in the history of the past, this itself, in our eyes, would give it character and importance enough. When this Constitution says "*The privilege of the writ of habeas corpus* shall not be suspended, unless when in cases of rebellion, or invasion, the public safety may require it," this is sufficient for us to know, that the cases requiring the suspension must be urgent indeed, and clearly and unmistakably made out. And by this rule, and some others laid down in that Constitution, we propose to examine this act of February 15, 1864, and we shall attempt to show that tried by the Constitution, what our convictions tell us is true, that,

1st. That act, in many of its essential features, is utterly at war with the Constitution; and

2d. There was not, at the time it was enacted, any such emergency or exigency as required its passage; and there is not now any occasion for its being continued in force.

That part of the Constitution from which Congress derives the power to suspend the writ of *habeas corpus* is among the class of powers, and relates to none others, that belong to the legislative branch of the Government—no mention is there made of the executive and his powers. Of necessity, as it is generally, if not universally, conceded, Congress is the judge whether the public safety does or does not require it, and the judgment of Congress on this point, must be conclusive. Should the public safety at any time require the suspension, it is for the legislature to say so. That question depends on political considerations, in which the legislature alone is to decide. The

Congress, representing immediately the people, and having the law-making power in its hands, is presumed to know, at all times, better than any person or persons, the necessities of the country; to be better able, upon a given state of facts, to form an opinion consistent with the public good, and to feel more sensibly the great responsibilities growing out of the power, was wisely entrusted with this authority. This question has been so fully determined by Chief Justice Marshall in *Bollman, exparte*, 4 *Cranch*, 95, 101, and aftewards reaffirmed by *Chief Justice Taney* in the famous *Merryman case*, in 1861, that argument is not needed to bolster up this proposition. If, then, Congress must find the necessity to exist, it must, under the Constitution, suspend the writ itself. It is a legislative act to be exercised under a delegated power. For two good reasons, then, Congress cannot in the least delegate this power, 1st. It is a legislative power, which, under the Constitution, cannot be exercised by a separate and distinct branch of the government, having and possessing totally different powers from the legislature under the Constitution. 2nd. Power delegated cannot be, by the agent to whom it is given, delegated to another; this is a familiar rule as old as the law itself. What, then, becomes of those features of this act, which authorize the President, or others to be named by him, to say who shall be arrested, and who shall be held in custody, which we see in sections 1 and 2 of the act? If the judgment of Congress be conclusive, where does the law-making power get the authority to so limit or modify its judgment, as to reach cases only to be named by the President or by persons designated by him? That authority cannot be held. The action of Congress must amount absolutely to a finding of the facts, and a judgment absolute of suspension, or its action amounts to nothing. When Congress says the writ is suspended, there is an end of it, and nothing more is to be done. These various degrees of delegation of power are not to be tolerated; they avoid the very responsibility in the discharge of duty which the Constitution imposed, for the wisest of purposes, upon the law-making power. It amounts to a delegation of legislative power to the Executive and his appointees, which destroys in fact the legislature entirely if legitimately followed out. With the same propriety the Congress might leave it to the Executive, or those to be appointed by him, to levy a tax upon the people, to raise and support armies, and any and every other power delegated by the Constitution to the Congress, might be thus given him. They stand upon the same foundation exactly. It requires much elasticity of construction indeed, to hold that Congress could even vest this great power in the Executive, but it is beyond comprehension and explanation, how Congress could go so far as to authorize him to name agents for the execution of this trust, as delicate and important a trust as was ever confided to man anywhere or at any time. This was a bold and long stride towards obliterating the lines of demarcation existing between these two branches of the Government.

But further, not merely does it clothe him and his agents with certain legislative powers, but it gives them, to a great extent, judicial powers also. They must say who is to be arrested, and then investi-

gate the causes of arrest afterwards. Relative to this, in the first place, we have to say, that while it is true that Congress may, under article 3, section 1, clause 1, establish inferior courts, yet it is true that the Constitution nowhere permits the appointment of judges, or those who are to hold courts, in such a manner as is designated by this act. These men, when appointed, must clearly exercise the duties of judges; they apply laws to facts, in certain cases, and find a judgment of discharge or detention; they are in truth judges, and as such are charged with serious and heavy duties. The appointing of such officers, or of officers for such purposes, was unquestionably intended to be by the President, by and with the advice and consent of the Senate, (art. 2, section 2, clause 2, of the Constitution.) if they were ever to be appointed at all.

Officers entrusted with such vast powers as these are by this act, cannot, by any latitudinous construction be made to come within that class of inferior officers mentioned in the article of the Constitution quoted. They are, in fact, courts, or they have no place whatever under our Constitution. If they are courts, they are made to take the place of courts which are already known and recognized under the Constitution. Then the two-fold objection is presented broadly here to this delegation of power. 1st. The supervisory control of the Senate over executive appointments is entirely taken away or discarded. This has always been deemed a wise, judicious and valuable check in the system of checks and balances adopted in the United States, and in the Confederate States. The framers of the old Constitution attached no small value to it. Here we see it at one breath swept away, and one more of the securities of the people is suddenly destroyed without any equivalent or show of one in lieu of it. 2d. The courts of the country, intended to look into and investigate all such matters, are, with one dash of the pen, broken down and supplanted. The judiciary, one of the independent branches of the Government, co-equal and co-extensive with the others, as all agree, is dealt a severe and crushing blow by this measure. Let us look at it. The appointees owe no responsibility to any one but the President, and immense powers affecting the life and liberty of our people are given to them. Is not the groundwork here laid for the erection and maintaining of as oppressive and tyranical a court or courts, as ever disgraced the earth? The *star chamber*, with its huge and enormous powers in its days of life and vigor, grew from the simple *concilium ordinarium*, which at at first seemed limited and circumscribed enough, but so gradually and constantly did it enlarge its sphere, that it became a most potent engine of mischief and destruction, until finally, after a long and sesevere contest, it was abolished, but not until after many an innocent and noble citizen had given up his liberty and his life upon its desecrated altar. And let us ask, in all candor, does this not look like returning to that odious doctrine, which held sway in the time of Charles I., when the privy council would recommit persons brought out on *habeas corpus* answering, they had been committed "*per speciale mandatum regis?* Heath, the Attorney General, argued this a good return, as the king's order had imprisoned them, and he

could do no wrong, and upon the strength of these four words (*per speciale mandatum regis*,) Nicholas Hyde, C. J., sustained the commitments. Whatever plausibity there might have been for this course in England, where the king is thought to be *infallible*, it can find no place with us, where the duties and powersof the President are as clearly defined as are those of the Congress. But we are not far removed from this point, when we allow persons to be arrested upon the order of the President, or Secretary of War, or the general officer commanding the trans-Mississippi department, and then allow persons to investigate their cases, who are appointed by the President, responsible to him alone, and knowing in their office no one else. This is an overshadowing power Congress cannot give to any one, and if it could do so, it should not.

But objections, grave and overwhelming, multiply. In the classification of the offences for which arrests are to be made, we have thirteen heads, or orders. Those named in the 1st, 2d, 3d, 6th, 8th, 9th, 10th, 11th, and 13th, are all crimes, or the ingredients and essential elements of crimes, for the punishment of which ample provision is already made, from the arrest to the final conviction and punishment. They are either treason, or they are features or evidences of treason. Now, by committing a person for these offences, or any of them, and creating this special tribunal to investigate, we set aside courts already created, and clothed with full and ample powers to dispose of them. These persons appointed for investigation can easily—they determining the question, as no one else is provided for this by law, whether the party arrested can be speedily tried—put an end, practically, to all the rights a party may have in the courts of the land. When these persons say the party is properly arrested, there is an end of the matter, according to this law. The door is closed to any further investigation, and the party must remain until some one not mentioned brings him out. One of these judges, *or investigators*, wishing to crush some individual by saying he cannot be speedily tried, and on looking into his case he finds he ought to remain in confinement, has the liberty and life of the citizen effectually in his hands. Nothwithstanding the judiciary, provided for by our Constitution, and in which we all take so much just pride, we see it thrown down and prostrate in the dust before this tribunal, that finds no place in our organic law, and is not countenanced by the genius of our system of government.

As to the offences named in the fifth and sixth classifications, the military laws, the rules and articles of war, are ample and sufficient, and there is no necessity for giving this authority as to them. These are military offences generally, and military law is swift and potent enough to meet them all. For instance, there we have spies and other emissaries of the enemy. We all know that the laws of war are sufficient to deal with them. Andre was caught, tried, convicted and executed as a spy, in the first revolution, under the rules and regulations of the army, adopted by the British Parliament more than a hundred years before that time.

Of the fourth and twelfth classifications: It is plain to us Congress

has nothing on earth to do with them—they are left to the States. There is no State in the Confederacy, we dare say, that has not a severe statute against attempts to incite servile insurrection; and so careful has the President been on this question, that proper regard might be had and paid to States' rights, in his message submitted to the first Congress, January 12, 1863, (page 11,) he recommended that certain persons, taken in attempting to execute Lincoln's emancipation proclamation, be turned over to the States, to be dealt with under the laws of the States providing for the punishment of criminals engaged in exciting servile insurrections. These are matters peculiarly within the province and jurisdiction of the State tribunals. And so, too, of the offences of burning and destroying bridges, railroads, telegraphic communications. These are matters of local concern altogether. The strict anti-internal improvement policy of this Government would forbid Congress passing any law on these matters. By these two sections, the Congress lays the foundation for a serious collision with the States. In our somewhat complicated system, collisions may not always be avoided, but certainly it is wise always to try to avoid them, and still more so is it never by any means to invite them, or to put on the appearance of inviting them. It is a strange feature in this law, and one that cannot be maintained at all, that it seeks to imprison persons for acts not crimes by any laws that we know of, or that are on our statute book. Nor does the act itself make them crimes, in legal acceptation. There are certain acts named that do not come within the meaning of treason, nor any other offence. Calling these offences do not make them so. An offence is, in law, an act for which any criminal punishment may, by law, be inflicted. Where is any punishment by law provided for many of these acts here named? No where at all. Then the anomaly is presented of arresting and detaining a person for an act for which there is no punishment provided. This surely is something new under the sun. The object of all arrests and holding persons is, or should be, to bring them to punishment for offences committed. But here they are to be arrested and held, if we may be allowed the expression, for offences that are not, in truth, *offences*

But we propose to go further, and examine this provision with regard to the suspension of the writ of *habeas corpus*, in connection with other constitutional guarantees.

In the *Merryman case*, above referred to, Judge Taney held, *that even if the writ of habeas corpus was suspended by the act of Congress*, and a party not subject to the rules and articles of war was afterwards arrested and imprisoned by regular judicial process, he could not be detained in prison, for the article in the amendment of the Constitution, which provides for a speedy and public trial of persons, in all criminal prosecutions, by an impartial jury in the State and district wherein the crime shall have been committed, &c., &c., would prevent it. This feature of the old Constitution is identical with article 1, section 9, clause 17, of the Confederate States' Constitution. This part of the Constitution vanishes at once if the enormous power granted by the act of suspension can be upheld. The reasoning of

Judge Taney on this point is clear, cogent and convincing, and we commend it to the careful consideration of Congress and the country. He speaks like Nestor, and his voice is as an oracle. He exhibits almost unparalleled moral sublimity in thus speaking out for the rights of man, in the face of bristling bayonets, under the very shadow of the throne of the tyrant, and amid the corruptions of his court. All the rights given by this clause are held by him to be sacred and inviolable.

Clause sixteen, of same section and article, provides for indictment, and the party shall not be deprived of life, liberty or property, without due process of law. The great judge, in the case just noticed, held, as we never heard doubted until lately, process of law meant *judicial process!* By a strange and novel mode of reasoning recently in our hearing, we have heard that *process of law* did not mean *process of law.* We think *law of the land* is held to be due process of law—a trial by due course and process of law; and we cite *Magna Charta*, c. 29, 2 Inst. 50. Judge Coulter so held it, in one of the ablest opinions ever delivered on this continent, or any other—6 Penn St., (Barr's) R. 86, 91. *Kent*, who made the law classic in this country, so held it—2 Com. 13. It was so construed in two leading cases in Tennessee—2 Yerger 500, 10 id. 71. In North Carolina, in Hoke *vs.* Henderson, 4 Dev. 1., the same doctrine is laid down, and, in fact, we know not where it is not. Beyond all cavil, then, the words "*due process of law*," in this place, cannot mean less than a prosecution or suit, instituted and conducted according to the prescribed forms and solemnities, for ascertaining guilt. The security of life and liberty lies at the bottom of the social compact; and to say that this grant of *legislative power* to suspend the *habeas corpus* includes the right to attack the liberty of a person in this way, is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which the Government was established. In other words, the people put it in their agents' hands for protection and safety, and told them to destroy it if you please! Or, again, the people made a free Government, and empowered the legislature to make a despotism out of it! It is this, in plain, simple, and unvarnished English. The rights vouchsafed under the two clauses just cited, are dear to us by virtue of their age. They are much the same as the third and fourth articles of polity that were recognized as forming a part of the English Government when Henry VII. came to the throne. They stand now as imprescriptible rights of freemen. As they prevented King and Parliament often, in their fierce and sanguinary contests for power, from oppressing and enslaving the people, we should treasure them as our birthright, and should be slow indeed to see them struck down by action of Congress, which, as much as any other power, was intended to be curbed and restrained by them. They are but empty and unmeaning songs, if Congress can at any moment lay them aside, and deny them to the citizen. We cannot yet believe this to be within the authority of Congress.

*Clause* 15, *of article* 1, *section* 9, protects the people from unreasonable searches and seizures, and provides no warrant shall issue but

upon probable cause, supported by oath or affirmation, &c. We have been told that the issuing of a warrant was merely a ministerial act! This is a sad mistake. The issuing of a warrant is a direct judicial act. A warrant is defined to be a process under seal, issued by some court or justice, authorizing the officer to whom it is directed to arrest or apprehend a person named; (*2nd Burrill's Law Dic. p.* 1058.) By all our usages and customs in this and the old Government, a warrant, as named in the Constitution, occupied this position—it was a judicial writ. That the *Privy Council* of England issued them, only proves they were judicial writs, for that council claimed, and as we all know, exercised vast and extraordinary judicial powers for a long period of time. There can be no question, then, if this clause of the Constitution means anything, that the arrests provided for by the act of suspension are clearly unconstitutional. But let us waive this, and suppose any person, upon his own motion, whim or caprice, might issue a warrant to arrest a party, or arrest him without any warrant at all, the question arises can he detain him, or can Congress authorize any party to have him kept, in view of clauses 16 and 17 of article 1, section 9, already discussed? Just suppose the party in jail, and no question raised as to how he came there, what is to be done with these guarantees? This is an enquiry of moment, and we should be glad to have it answered. Take it in any view you please in connection with these three clauses, (15, 16 and 17,) of equal grade and dignity with that authorizing the suspension of the writ, this act of 15th February, 1864, violates the Constitution as palpably as ever a statute did the organic law. And we submit this conclusion to the House and the country with unshaken confidence, that, for the reasons assigned, it is correct and perfectly tenable.

The public safety did not require, as far as Congress knew, the suspension of the writ, nor does it now require this suspension to continue. When we say Congress must be the judge of the exigency demanding this action, it means Congress, upon the facts presented, must determine the question upon its own knowledge, and not upon the mere belief or opinion of the Executive or any one else. Because the President asks for the suspension, it is no good reason in itself that the writ should be suspended. The facts upon which he requests the suspension should be laid before Congress in just precisely the same shape in which they came to him. The Congress is required to know the facts, and to be able to refer to them in a legal form. This power cannot be exercised upon faith or in trust. As well may a jury, whose province it is to ascertain the existence of a fact, find this fact to exist because the judge might have told them so. The responsibility upon Congress is poorly met and discharged, when they undertake to suspend this writ, because the President tells them simply he thinks the writ ought to be suspended upon information he has, which information does not come before Congress to be there sifted and analyzed. The great poet, in painting the wretched condition of our parents in the garden, after plucking the forbidden fruit, represents them as being called upon in a solemn and awful manner, to

know why this injunction was disobeyed, and when the offence was sought to be placed by one upon the other, the question is propounded, who made the one lord and master of the other that this should be done upon his order? When Congress is called on to know why and upon what facts this action was had, it will be an empty response to say the Executive told us this fact existed, though there was no evidence of it before us, and we cannot present you the testimony. The President may well be mistaken on questions like the present—he may be imposed on by designing persons. Therefore, the necessity for Congress to enquire into and ascertain, for itself, the existence of the fact. When the bill in Burr's conspiracy was before the Senate of the United States, the President sent to Congress all the papers, letters, &c., and other evidences in his possession, with his message, so that Congress might see and judge for itself. In this case nothing of the sort was done. There was no evidence furnished the Congress by the President beyond the statement contained in his message. Certainly the Prseident belived all there stated was true, and it might have been, but this does hot relieve Congress of the duty to examine and ascertain for itself. It is but another security for the citizen that Congress must, from information presented, know this fact, and the simple believing or knowing it by another will not answer the purpose.

We hold, too, that Congress must not have any doubts on this subject. If there be doubts the case is not made out. The case, as it calls for the exercise of rare and unusual authority, must be made to appear by clear and indubitable proof. The very section of the Constitution conferring this power, shows it must leave no room for doubt. The doubt existing must go in favor of the Constitution. This position is most clearly deducible from all the adjudications on this subject, as well as from all the analogies furnished by legal enquiries. And we hesitate not to say, if Congress had doubts on the existence of the exigency, it was its duty to have refused the suspension.

In the absence, then, of any testimony being furnished the Congress, did the fact exist to justify this suspension all over the Confederacy? We think not. And before proceeding further let us here call attention to a passage in the President's message, submitted Dec. 7th, at the session during which this act was passed:

"*For nearly three years this Government has exercised unquestioned jurisdiction over many millions of willing and united people. It has met and defeated vast armies of invaders, who had in vain sought its submission. Supported by the confidence and affection of its citizens, the Confederacy has lacked no element which distinguishes an independent nation, according to the principles of public law. Its legislative, executive and judicial departments, each in its sphere, have performed their appropriate functions with a regularity as undisturbed as in a time of profound peace, and the whole energies of the people have been developed in the organization of vast armies, while their rights and liberties have rested secure under the protection of the courts of justice.*"

Now, what great convulsion or upheaving has occurred to mar the beauty and symmetry of this picture? Certainly the public would

not have been unacquainted with such startling events? The state of affairs presented by the report of the majority on this point is certainly gloomy indeed. But it does not accord with the facts as the President presents them in his message early in that session, nor does it, we are of the opinion, accord with the true state of the case then existing. "Look first upon this and then upon that picture," and judge. It is true there was an invasion, but our armies were in good condition, and full of hope; many parts of the country at peace and undisturbed, where the laws were in force and where no danger threatened. It is true some men were trying to test their legal rights upon the different laws enacted by Congress to fill up the army. This they had a right to do, and it were a great pity that they should ever be deprived of this right in a country claiming to be under a free government. It is true, beyond question, there were some localities in which there was trouble, and may be strong measures were necessary to reach the offenders, and the facts, doubtless, could have been presented in an authentic shape to the Congress. But in the absence of those facts Congress should not act. And, besides, to reach a few localities, or a few individual cases, gave no sufficient reason for this suspension over the whole Confederacy. Now, we are ready to admit, that upon the facts laid before the Congress, showing wide-spread disloyalty and attempts in certain localities to overthrow the Government, we would, undoubtedly, have voted for an act to suspend the writ as to these. The bill in Burr's rebellion was minute as to locality and as to crimes or offences attempted. Upon the proper evidence furnished, we are now ready, as we have been all the time, to vote for an act of this kind, but we cannot, and we do not, think it right to put the whole country under this suspension for the sake of punishing persons here and there in certain places.

We think it is fact well established by the past, and one we should not forget, that the intimidation of a few disaffected persons is always dearly bought by alienating any large class of the community, or by incurring the risk of alienating them. The statement of the report of the majority means simply this, and it was startling news to us, that the people had become tired and sick of the struggle, and were ready to abandon it, and they needed this coercive and harsh measure to keep them in the line of their duty. This is a sad commentary, indeed, upon the people's struggle, the people's war, begun and prosecuted to secure the people's rights. We must remind Congress and the country, that a sort of instinctive reasoning always tells the people what may be the learned are sometimes unable to discern, that the truth and the justness of a cause begin to be very suspicious when they stand in need of prisons and other means of torture to eke out its evidences. But further, those very disaffected and disloyal persons sought to be punished by this act, rejoice at the announcement of the fact, that we had resorted to such measures, for they had been preaching our tyranny and oppression, and they had been saying we were no better than the northern Government. We all must remember what a pang of horror seized the country when we heard of the arbitrary acts of the Lincoln Government at first—to such an extent

did they go, that a southern writer of much fame, in speaking of the imprisonments north in the bastiles, said: "one universal wail then went up that *habeas corpus* was no more." In the indictments which we have framed before the civilized world against our enemy, we say, among other things, the writ of *habeas corpus* has been suspended! We should be careful and not lay ourselves liable to this charge too. There is great danger in thus attempting to speculate upon the patriotism of our people, as many deem this act does, of driving from us a large class of persons who, in truth and in fact, are true to the cause, and who, with the proper course pursued towards them, would aid and assist in the struggle to the last. For there can be no doubt whatever, that the continual effort and alarm, attendant on a state of constant danger, will often compel nations, the most attached to liberty, to resort, for repose and security, to institutions which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free. The great moral effect upon our own people, upon the world at large, and the cause of rejoicing to the north this measure gives, more than counterbalance all the good effects that could flow from it for years to come. While it cut every free citizen to the bone, it gave the world reason to believe this was not the asylum of liberty and free government we had claimed it to be, and it stimulated the north with the conviction that we were well nigh worn out, and the war could be maintained only by the exercise of cruel and severe power. This presents a wonderful state of case, when we reflect, that, in the first revolution, that good man, Washington, advised arrests to be made only in the support of the civil authorities, and the orders for arrests in the western insurrection seem to have emanated from the federal judge of the Penn district: See *Findlay's History Western Insurrection*, 144–200–204, nor in the rebellions of 1787–94, was the writ suspended in any but one of the States; and Congress refused to suspend it in Burr's rebellion.

If the facts did not then exist, they do not now. With great success to our armies, our people buoyant and encouraged, and a general effort, warm and zealous, to aid the Government in everything, we look in vain for any evidences of disloyalty to such an extent as would justify the country's remaining under this suspension. It is true Lee is threatened with a large and mad host of invaders—this we all expected. And it is true Johnston is now before a like band of murderers. But every State in the Confederacy is fully and fairly represented in our two armies, to the full quota, and have been. And the work of death, there by those who would destroy us, need not be aggravated by oppression under our own laws at home. Whatever clamors there may be in localities as to our Government, yet no State has declined or refused to do her duty. Georgia and Mississippi, whose Legislatures have expressed their convictions upon this subject, have come up at all times, and are now in the lines with their brave men to be given up as sacrifices to liberty. North Carolina, in whose borders it has been often said there is an alarming disaffection, stands high on the roll of honor, and in means and men, has contributed as

one holding her great name should contribute Then where does all this trouble exist? Is it, in fact, in existence? Has not our President been misled or imposed upon? Then let our courts go on, permit this confidence of the people to live untouched, and support the cause so dear to us all—do not let us longer distrust the judiciary of the land—let us respect the laws of the country and counsel their supremacy—let us imitate the noble and saint-like-person, Washington, who, as said by a celebrated Englishman, even after he had made the lion crouch in the dust, was the purest, best and greatest of men—he always enjoined the subordination of the military to the civil power, and accompanied the army, in person, to see the civil supremacy upheld and vindicated. Such is the spirit of our theory of government, and a departure from it, however, small, will end only in wrong and oppression.

The reply we sometimes hear, that the injury is small, or, there are only a few cases in which any mischief is done, is no just and sufficient response. The great mountains are disintegrated by small particles—the sting of an insect upon the young and tender sapling may, in after years, cause the wreck of a great man-of-war. Hampden was assessed only twenty shillings of ship money, yet this made an impress deep and lasting upon the British Government; contributed no little to bring the head of Charles to the block, and rendered the name of Hampden immortal wherever his mother tongue is spoken. Nor does it meet the question to say it was not intended that this power should be generally executed—this is a pretext often insidious, always insecure, and tending to mask the approaches of arbitrary Government, although the best of intentions may have prompted the enactment of the measure.

It is asking too much of the House to give credence to the fact that the mere act suspending this writ has contributed materially to our recent successes. What on earth has this to do with the brilliant successes of Forrest, in Tennessee; Taylor, in Louisiana; Price, in Arkansas; Finnegan, in Florida? If it has had any, certainly there has been no publication of the fact. We apprehend it has about as much to do with these victories as an act of this House expelling one of its members for disloyalty would have in bringing the war to an immediate and successful end.

It is not a fair mode of argument to say that those who oppose this suspension dread the President, and have no confidence in him. This question should be discussed regardless of persons. Were the twelve Apostles in his place we should feel just exactly as we do, in this respect, towards them as we do towards our President. We have not this power to give Mr. Davis or any one else—and it is sufficient for us, believing, as we do, that the Constitution, which permits us to sit here, forbids us giving the power—or, rather, does not itself confer it upon us to be given to any one. But to meet this point directly—we have confidence in him—he has not asked for undue powers in the course of his administration—nor do we believe he desires to make himself a despot, or to overthrow the liberties of the people—we cannot see how he could desire this—we voted willingly and cheerfully

for him for this elevated position, and we do not regret it. We know of no one who could have managed our affairs better. We hope this quite sufficient.

Nor is it right and proper to charge those who oppose this act with opposing the administration, or siding with those who do oppose it. We have upheld and do now uphold the Administration. We have voted for and supported all the leading measures of Congress to support and carry on this war, and we have in all cases advised and counseled our constituents to obedience to laws, which even did not meet with our approval, in order to secure unity and harmony. But in the discharge of a great constitutional duty, we must judge of it by the best lights God has given us, and in the conscientious effort to meet the responsibility, we cannot be restrained in our efforts by any charges of this kind. We intend to support the Administration—we deaire it to live and work out our destinies—secure our liberties, preserve the Constitution unharmed amid the crash and wreck, which we look upon as the best gift to man next to the *Good Book* itself.—In this Government we must not forget much in the way of improvement has been promised our people, and its every act will be closely watched and enquired into. As the promise has been made, its performance is looked for. The remarks of Hallam on the character and reign of William III. are so appropriate we cannot refrain from inserting them: "A new and revolutionary government is seldom dealt fairly with. Mankind, accustomed to forgive almost every thing in favor of legitimate prescriptive power, exacts an ideal faultlessness from that which claims allegiance on the score of its utility; the personal feelings of its rulers, the negligences of their administration, even the inevitable privations and difficulties which the nature of human affairs or the misconduct of their predecessors create, are imputed to them with invidious minuteness; those who deem their own merit unrewarded, become always a numerous and implacable class of adversaries; those whose schemes of public improvement have not been followed think nothing gained by the change, and return to a restless censoriousness, in which they have been accustomed to place delight." These are well worthy of consideration as being in the main applicable here and now. Then, in short, it is at no time supposed the President desires to establish a despotic power over the people. Such power, we think, could never have been the waking dream of the President; but, as the slightest inroads upon private rights and liberties are to be guarded against in any nation that deserves to be called free, we should always keep in view not only that our Constitution is the paramount law, but that a stab at it is a blow at the Administration and the liberties of the people besides. The best way to preserve the Administration and our liberties is to obey and follow the Constitution. We cannot believe the time has come when the conservation of all demands the sacrifice of the legal rights of the few; "and it is an unhappy consequence of all deviations from the even course of law, that the forced acts of overruling necessity come to be distorted into precedents to serve the purposes of arbitrary power." Mr. Davis cannot have this law executed in per-

son, in fact, the very delegation of authority to others contained in the law takes it out of his hands in many instances. So, however much may be our confidence in him, it cannot attach to all those who are charged with the execution of this law. It creates too broad a field for the workings of bad, evil and malicious feelings over the country. The evils, too, resulting from a wrong of this kind are not within the reach of a remedy—no reparation can be made.

This brings us to consider the last feature of this law we desire to discuss, and to it we invoke the special attention of Congress. The power given to the general officer commanding the trans-Mississippi Department cannot be, for reasons we have already advanced, confided to him. It substitutes him in the place of Congress, and clothes him with judicial powers extraordinary indeed, and for which we find no warrant in the Constitution. But supposing this could be done, we must protest against it in view of the reckless and inhuman abuse of power heretofore exercised there by persons in command. In General Smith, who is now in command there, the people across the Mississippi river have, as we believe, full and implicit confidence, both in his ability and patriotism. He is wise and discreet, and upholds the civil tribunals in their supremacy over the military authority. But we have no assurance as to how long he will remain there; the rapid changes in the fortunes of war may remove him at any time. The experience of these people under his two immediate predecessors is too bitter to reconcile them to this rule. Their acts of oppression and misrule are written upon the hearts of those people in letters of fire, and all the rains of high heaven cannot obliterate them. The printed report of General Hindman confesses to assumption of power on his part not authorized by law, and seeks to justify the same on account of the condition of affairs. And he would seem to intimate that if such measures had been resorted to before, the country would have profited by them. Such is always the language of the supporters of tyranny—where oppression does not succeed, it is because there has been too little of it. Clarendon thought the act of *Charles II.* against conventicles would have produced beneficial results if vigorously executed, when, in truth, the jails and prisons were filled with persons against whom this act was aimed. From the previous history of the war over there it was useless to have given this power, because the generals preceding General Smith were in the habit of imprisoning persons without warrant, without offence charged—suspending all law. The people there have suffered untold wrongs and oppressions by virtue of these usurpations. And so far as any weakening of our cause in that quarter is concerned, these acts have contributed more to bring it about than all the efforts of the enemy. It is a long ways from the President to that country, and the journey is difficult and dangerous—deeds are done there that can not be remedied here—it will be too late. Mr. Davis may rebuke misrule there, as he has done, but this does not restore the injured to their rights, nor does it restore the confidence destroyed by those misdeeds. Congress should think well and maturely on this, and reflect upon the state of affairs there, before sanctioning this suspension.

And for those people who have suffered so much under this rule, we must say to Congress, "*No more of this Hal, and thou lovest me!*"

The above are the reasons that have brought us to the conclusion that the *act of 15th February*, 1864, has no constitutional sanction, and is not justified by the facts existing at the time of its passage, nor by those now existing.

The report of the majority makes no recommendation. We make none, and will not unless some direct action is proposed to be taken as to this measure. In that event, our course will be plain, and direct. Until then, we leave the matter with the House.

This report, we are aware, is too long; but the importance of the subject, the great issues at stake furnish an apology. We regard much of the vitality of our free Constitution as depending upon this contest, and while the heart of the country throbs with deep anxiety as to the result, this decision will form an era in our history remarkable, indeed, and never to be forgotten. We have prepared this report with all proper respect to those who have differed with us, for we labor in the same cause and with the same ultimate end in view. For them we can have no ill-feeling, but, on the contrary, we entertain the kindest emotions towards each and all of them. We respect their opinions—the subject is one of difficulty and of doubt. It never fails to vex the best minds of any country when presented. They may be right—we may be wrong; but one thing is certain, this report is now presented under a deep sense of the solemn responsibility resting upon us, with a due appreciation of the interests involved, with a proper regard to the perils by which our common country now finds herself surrounded, and with the conviction of a conscientious discharge of the trust confided to us by constituents of freemen.

In this fanatical war, waged against us, we need not doubt of the result if we are true to the rights of the people—true to the Constitution we are sworn to support, which is the first and paramount duty of the legislator. Let each branch of the Government square its action by this instrument, and the patriot soldiers in the field will win us a peace at no distant day—a proud, permanent peace—and our young Confederacy will come forth "a noble, puissant nation, rousing herself like a strong man after sleep, and shaking her invincible locks"—her sun will ride high above us, blazing in its meridian like the sun of heaven, but, unlike that sun, it will know no night.

Respectfully submitted,

A. H. GARLAND.
B. S. GAITHER.

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